Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. —398—

PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Petitioners,

—v.—

CURTISS-WRIGHT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The Federal Court of Appeals has decided an important state question involving the "accrual" of a cause of action in a way in conflict with applicable Florida and New York law 5

II. The unreasonableness of the Court of Appeals' interpretation of the New York statute of limitations has resulted in an arbitrary and unconstitutional application of that statute 7

Conclusion 8

Appendix

First Opinion of the United States Court of Appeals for the Second Circuit 1a

Order following Petition for Rehearing In Banc 10a

Order following Petition for Rehearing 11a

Second Opinion of United States Court of Appeals for the Second Circuit 12a

Dissent of Circuit Judge Hays 21a

Note Regarding Missing Documents 24a

CITATIONS

PAGE

Cases:

Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963) 19a, 21a, 22a
Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858 (5th Cir. 1966) 5, 23a
Berg v. Curtiss-Wright Corporation, 224 F. Supp. 236 (D.C. S.D.N.Y. 1963) 3a
Bicknell v. Central Hanover Bank & Trust Co., 169 Misc. 7, 6 N.Y.S.2d 704 (1938), aff'd 255 App. Div. 956, 8 N.Y.S.2d 668 (1st Dep't 1938) 6, 23a
Braniff Airways, Inc., et al. v. Curtiss-Wright Corporation, 411 F.2d 451 (2nd Cir. 1969) 1a, 13a
Braniff Airways, Inc., et al. v. Curtiss-Wright Corporation, 424 F.2d 431 (2nd Cir. 1970) 12a

Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965) 20a
Creviston v. General Motors Corp., 210 So.2d 755 (Fla. Dist. Ct. App. 1968) 7a, 8a, 14a
Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969) 15a, 18a, 22a

First Nat'l Bank v. Marcher, 179 Misc. 258, 38 N.Y.S. 2d 774 (1942) 6, 23a
Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871 (1969) 8a, 14a, 22a

George v. Douglas Aircraft Co., 332 F.2d 73 (2nd Cir. 1964), cert. den. 379 U.S. 904 (1964) 5

Hotaling v. General Elec. Co., 16 A.D.2d 339, 228 N.Y.S. 2d 376 (3rd Dep't 1962), aff'd 12 N.Y.2d 310, 189 N.E. 2d 698 (1963) 8

PAGE

Huddleston v. Dwyer, 322 U.S. 232 (1914) 16a

Johnson v. Cadillac, 261 F. 878 (2nd Cir. 1919) 16a, 17a

Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961) 19a

Klaxon v. Stentor Mfg. Co., Inc., 313 U.S. 487 (1941) 14a

Lamb v. Powder River Live Stock Co., 132 Fed. 434 (8th Cir. 1904) 7

Lennig v. New York Life Ins. Co., 130 F.2d 580 (3rd Cir. 1942) 17a

Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796 (1965) 19a

McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) 16a

Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969) 5, 7

Merchants Fire Assurance Corporation of N. Y. v. Retail Credit Co., 23 Cal. Rptr. 544, 206 Cal. App. 2d 55 (Dist. Ct. App. Cal. 1962) 5

National Comics Publishers v. Fawcett, 198 F.2d 927 (2nd Cir. 1952) 16a

Noel v. United Aircraft Corp., 342 F.2d 232 (3rd Cir. 1964) 5a

Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), cert. den. 310 U.S. 650 (1940) 14a

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (D.C. Md. 1968), aff'd 398 F.2d 226 (4th Cir. 1968) 7

Schauble v. Schulz, 137 Fed. 389 (8th Cir. 1905) 7

PAGE

Schwartz v. Heyden Newport Chemical Corp., 12 N.Y. 2d 212, 188 N.E.2d 142; mod. 12 N.Y.2d 1073, 190 N.E. 2d 253; cert. den. 374 U.S. 808 (1963) 7, 7a, 8a, 14a, 18a, 22a

United States v. Certain Land, 420 F.2d 370 (2nd Cir. 1969) 15a

United States v. 63.04 Acres of Land, 257 F.2d 68 (2nd Cir. 1958) 16a

Urie v. Thompson, 337 U.S. 163 (1949) 7

Vandercook v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 16a

West v. American Teleph. & Teleg. Co., 311 U.S. 223 (1940) 6

Zuck v. Interstate Publishing Corp., 317 F.2d 727 (2nd Cir. 1963) 5, 23a

Constitutional Provision, Statutes and Rules:

Federal Rules of Appellate Procedure

Rule No. 26(b) 15a

Rule No. 40 ..... 15a

Federal Rules of Civil Procedure

Rule 24(c) 9a

Rule 50(a) 3a

Fla. Stat. §95.11(4)(e) (1967) 7a

Fourteenth Amendment (Section 1), U.S. Const. 2-3, 7, 8

PAGE

New York Civil Practice Act, §48(1) 3

New York Civil Practice Law and Rules (McKinney 1963)

§202 ..... 7a, 14a, 18a

§203 ..... 20a

§203(f) 20a, 23a

§213(2) 3a, 7a, 14a, 18a

U.S. Code, Title 28, §1254(1) 2

Miscellaneous:

Weinstein-Korn-Miller (New York Civil Practice), Vol. 1, §203.01; p. 2-39.2 ..... 5, 23a

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No. ——

PHILLIP ADDABBO and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

Petitioners,

—v.—

CURTISS-WRIGHT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Phillip Addabbo and Morton D. Stein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 19, 1969 as modified, in part, by the Court of Appeals' order dated April 16, 1970 following petition for rehearing.

Opinions Below

The oral decision of the District Court for the Southern District of New York delivered on June 20, 1968 has not been officially or unofficially reported. The first opinion of the Circuit Court of Appeals for the Second Circuit, printed in the Appendix hereto at pages 1a to 9a, is officially reported at 411 F.2d 451; and that Court's second opinion

(on a petition for rehearing), which appears in the appendix at pages 12a to 21a, is officially reported at 424 F.2d 427. The dissenting opinion of Circuit Judge Paul R. Hays is reported at 424 F.2d 431, and is also printed in the Appendix at pages 21a to 23a.

Jurisdiction

The pertinent judgment of the Circuit Court of Appeals was entered on May 19, 1969 and was modified by the Court of Appeals' order dated April 16, 1970 following petition for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether a Federal Court sitting in a "diversity of citizenship" case may ignore the applicable substantive Florida law regarding the accrual of breach of implied warranties claims with the result that injured aviation passengers' warranty suits were deemed time-barred.

2. Whether it is constitutional to construe a statute of limitations to the effect that injured aviation passengers' breach of implied warranties claims were deemed to have arisen before the passengers boarded the ill-fated aircraft.

Constitutional Provision and Statute Involved

(A) Fourteenth Amendment to the United States Constitution, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of* life, liberty, or *property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws". (Emphasis added).

(B) New York Civil Practice Art, Section 48(1).

"§ 48. Actions to be commenced within six years

"The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied, except a judgment and except as provided by section forty-seven and forty-eight-a".

(See also New York's later but nearly identical provision in Section 213(2) of New York's Civil Practice Law and Rules).

Statement of the Case

The litigation arose out of the crash of a passenger transport aircraft near Miami, Florida on March 25, 1958. The crash was caused, petitioners contended at the trial, by the failure of one of the aircraft's engines. Braniff Airways, Inc. owned and operated the DC-7C type aircraft involved and Douglas Aircraft Co. (no longer a party to the litigation) was the manufacturer of the airframe. Douglas had purchased the particular aircraft engine involved on July 17, 1956 from Curtiss-Wright Corporation, the manufacturer. The aircraft, with engines installed, had been sold by Douglas to Braniff on October 23, 1956. Ad-

dabbo and Berg (on whose latter's behalf Morton D. Stein petitions this Court in the capacity of Executor) were passengers severely injured in the crash.

Berg, who had sued in negligence in March of 1960, commenced a separate action on December 23, 1963 asserting breach of implied warranties. (Berg's negligence action has been remanded by the Court of Appeals for a new trial). His actions were to recover for personal injuries and for personal property. Addabbo's action to recover personal injuries was commenced on March 24, 1964 and was premised solely upon a theory of implied warranties.

The only portion of the Court of Appeals' first decision (411 F.2d 451) called into issue by the passengers' petition for rehearing was that dealing with the timeliness of the implied warranty claims. The passengers seek a writ of certiorari with respect to that part of the Court of Appeals' decision (424 F.2d 427) on the petition for rehearing which adhered to its prior determination that the causes of action of Berg and Addabbo based upon implied warranties were barred by the statute of limitations.

REASONS FOR GRANTING WRIT

I

The Federal Court of Appeals has decided an important state question involving the "accrual" of a cause of action in a way in conflict with applicable Florida and New York law.

Berg and Addabbo were both New York residents and the Court of Appeals correctly held (411 F.2d 454) that their implied warranty actions were thus subject to New York's six-year statute of limitation. See also: *Mandel* v. *Pittsburg Plate Glass Co.*, 25 N.Y.2d 340, 253 N. E. 2d 207 (1969). Although petitioners agree that the six-year period is the correct one to be applied, they contend that the Court of Appeals erred in not applying Florida's substantive "accrual" law as it is Florida's substantive law which governs. See: *George* v. *Douglas Aircraft Co.*, 332 F.2d 73, 76 (2nd Cir. 1964), cert. den. 379 U.S. 904 (1964), a related case.

The concept of time of accrual of a cause of action imports " . . . notions of substantive law. . . . " New York Civil Practice (Weinstein-Korn-Miller), Vol. 1 § 203.01, p. 2-39.2. As a general proposition, the period of limitations starts to run when, under the applicable substantive law, the elements of the cause of action are complete. *Merchants Fire Assurance Corporation of N.Y.* v. *Retail Credit Co.*, 23 Cal. Rptr. 544, 547, 206 Cal. App. 2d 55 (Dist. Ct. App. Cal. 1962). See also: *Zuck* v. *Interstate Publishing Corp.*, 317 F.2d 727, 735 (2nd Cir. 1963) (the date of accrual of a cause of action is determined under the law of the state whose substantive law governs the cause of action); *Baron Tube Co.* v. *Transport Insurance Co.*, 365 F.2d 858, 860

(5th Cir. 1966) (Georgia statute of limitations applied but Texas law applied regarding accrual).

The New York "conflict-of-laws" case law, which the Court of Appeals was bound to follow in a "diversity of citizenship" suit, does not appear to be to the contrary. See: *First Nat. Bank of Birmingham* v. *Marcher*, 179 Misc. 258, 38 N. Y. S. 2d 774 (1942) (law of Alabama applied to determine when the cause of action fully matured); *Bicknell* v. *Central Hanover Bank & Trust Co.*, 169 Misc. 7, 6 N. Y. S. 2d 704, aff'd 255 A. D. 956, 8 N. Y. S. 2d 668 (1st Dep't 1938) (Michigan statute and case law applied in determining issue as to when cause of action had matured).

The United States Supreme Court has, in the past, granted certiorari in a "diversity of citizenship" case upon a petition which set up that the United States Court of Appeals for the Sixth Circuit " . . . had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts." *West* v. *American Teleph. & Teleg. Co.*, 311 U. S. 223, 235 (1940). Petitioners respectfully submit that analogous considerations, involving the federal-state relationship, obtain herein.

II

The unreasonableness of the Court of Appeals' interpretation of the New York statute of limitations has resulted in an arbitrary and unconstitutional application of that statute.

Statutes of limitations conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. *Urie* v. *Thompson*, 337 U. S. 163, 170 (1949). An air-travelling passenger, unlike the usual purchaser of a product, is physically removed from the opportunity for discovery of a defect in the aircraft until, at the earliest, the transit is commenced. "[I]t is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one", *Mendel* v. *Pittsburg Plate Glass Co.*, 25 N. Y. 2d 310, 346, 253 N. E. 2d 207 (1969) (Judge Breitel dissenting); but this is the possibility created by the holding herein of the United States Court of Appeals for the Second Circuit.

The right to recover damages against another who inflicts injury has always been recognized as a property right. *Sanner* v. *Trustees of Sheppard and Enoch Pratt Hospital*, 278 F. Supp. 138, 142, aff'd 398 F.2d 226 (4th Cir. 1968) (negligence). A right of action which springs from contract (including, petitioners submit, the implied contract of warranty relied upon by passengers Berg and Addabbo) is property within the protection of the Fourteenth Amendment to the National Constitution. *Lamb* v. *Powder River Live-Stock Co.*, 132 Fed. 434, 439 (8th Cir. 1904). See also *Schauble* v. *Schulz*, 137 Fed. 389 (8th Cir. 1905); *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N. Y. 2d 212, 219, 188 N. E. 2d 142 (1963), mod. 12 N. Y. 2d 1073, 190 N. E. 2d 253 (1963), cert. den. 374. U. S. 808 (1963) (it would be

unreasonable and perhaps unconstitutional to hold that a person's time to sue expired before it was possible for him to learn of the wrong) (Chief Judge Desmond dissenting).

Statutes of limitations are construed, where possible, so as to give the parties their day in court. *Hotaling* v. *General Elec. Co.*, 16 A. D. 2d 339, 342, 228 N. Y. S. 2d 376, (3rd Dep't 1962), aff'd 12 N. Y. 2d 310, 189 N. E. 2d 698 (1963). Petitioners submit that it was a violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution for the Court of Appeals to have held, in effect, that the passengers' causes of action accrued at some time prior to the crash—a time before they were injured and before they learned, or could have learned, of the defects in the aircraft.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR E. DOW, JR.
Counsel for Petitioners

Dated: July 14, 1970